No. 01-626

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the ESTATE of BILLY D. JOHNSON, DECEASED,

Petitioner,

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL d/b/a METHODIST HOSPITAL MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC and HODGES CANCER CENTER,

Respondents.

On Petition For Writ Of Certiorari To The Seventh District Court Of Appeals Amarillo, Texas

RESPONDENTS' H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL d/b/a METHODIST HOSPITAL MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the intermediate Texas court of appeals, in holding that the state's medical malpractice act bars fraud and deceptive trade practice claims disguised as medical malpractice claims, raised an important question of federal law which should be settled by this Court, or is a ruling on an important federal question that conflicts with relevant decisions of this Court?

LIST OF PARTIES

The caption of the case includes the names of all parties.

Respondent, Lubbock Diagnostic Clinic is a trade name of Methodist Medical Group, which is a trade name of Lubbock Methodist Hospital.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari. The state courts below held that Petitioner's fraud and deceptive trade practices claims were preempted by Article 4590i of the Texas Revised Civil Statutes (Vernon 2001), and disallowed fraud or deceptive trade practice claims disguised as medical malpractice claims. That holding is a simple construction of a state statute, does not conflict with precedent from the Supreme Court, and raises no substantial federal question.

OPINIONS BELOW

The opinion of the Seventh District Court of Appeals for the State of Texas, entered December 13, 2000, is unpublished, and is reprinted in Appendix A to the Petition for Writ of Certiorari. The Judgment Nunc Pro Tunc and Order of Severance, wherein the trial court granted the motions for summary judgment of Respondents H. Grant Taylor, M.D., Methodist Medical Group, and Hodges Cancer Center, was signed by the trial court on July 21, 1999, and is reprinted as Appendix B to the Petition for Writ of Certiorari. The letter order of the Supreme Court of Texas denying the Petition for Review, dated May 17, 2001, is reprinted as Appendix C to the Petition for the Writ of Certiorari. The letter order of the Supreme Court of Texas denying the Motion for Rehearing, dated July 12, 2001, is reprinted as Appendix D to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is a case involving allegations of medical malpractice disguised as claims of fraud and violations of the Deceptive Trade Practices-Consumer Protection Act ("DTPA"), Tex. Bus. & Comm. Code Ann. §§ 17.41-17.63 (Vernon 1987). (CR1:3-6). Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, deceased, filed this lawsuit against H. Grant Taylor, M.D. ("Dr. Taylor") and Lubbock Methodist Hospital Practice Management Services, Inc., d/b/a Methodist Medical Group, d/b/a Lubbock Diagnostic Clinic ("MMG") among other defendants. (CR1:3).

Petitioner's Original Petition alleges that Petitioner's Decedent, Billy Dewayne Johnson, was diagnosed with metastatic adenocarcinoma with unknown primary in 1996. (CR1:4). She further alleges that Dr. Taylor of Oncology Hematology Associates and MMG referred Mr. Johnson to John P. Lytle, Jr., M.D. and Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center of Methodist Hospital for radiation therapy. (CR1:4-5). Dr. Taylor wanted Dr. Lytle to perform radiation therapy on the lesion on Mr. Johnson's right shoulder blade. Dr. Taylor believed that Mr. Johnson's situation was curable. Dr. Lytle also believed that the prognosis of Mr. Johnson, with regard to his overall disease, would get better at some point. Dr. Lytle based his decision to provide radiation therapy to Mr. Johnson upon the recommendation from Dr. Maale, another one of Mr. Johnson's treating physicians.

Dr. Lytle further made an independent decision separate and apart from the recommendations of Drs. Taylor

and Maale to offer Mr. Johnson radiation therapy. Mr. Johnson executed a Radiation Therapy Disclosure and Consent Form giving Dr. Lytle, as his physician, together with health care providers involved, permission to treat his condition which was explained to him to be cancer. Dr. Lytle further testified that he discussed Mr. Johnson's prognosis with him and his family. Dr. Lytle also testified that the decision to undergo radiation treatment was a decision made by himself and Mr. Johnson.

The Original Petition alleges that there is no treatment for metastatic adenocarcinoma with unknown primary and that neither the patient nor his family were notified of the patient's poor prognosis and that the radiation treatment intent was "palliative" only. Petitioner's pleading further alleges that the Respondents failed to disclose information known at the time of the transaction in question with the intent to induce Mr. Johnson to receive treatment he would not have agreed to had such information been disclosed. (CR1:5). The Original Petition alleges that such actions are a violation of common law fraud and the DTPA. (CR1:5).

Dr. Taylor and MMG filed their Motions for Summary on Judgment on the following grounds:

1. This is a medical malpractice case governed by Texas Revised Civil Statute art. 4590i and cannot be sustained under the DTPA as pled by Petitioner;

2. Petitioner lacked standing to bring a DTPA claim individually and on the behalf of the Estate of Billy D. Johnson, Deceased because such a claim does not survive the death of Mr. Billy D. Johnson; and

3. Nothing Dr. Taylor did or failed to do was the proximate or producing cause of any injuries or damages to the Plaintiff. (CR1:72-87).

Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center ("Methodist") subsequently filed its Motion for Summary Judgment. (CR1:25).

Dr. John P. Lytle, Jr., M.D. was nonsuited by the Petitioner. (CR1:15-16). The claims against Respondent Oncology Hematology Associates have been severed from this cause. (CR2:522-23).

The trial court granted the Motions for Summary Judgment and rendered take nothing judgments in favor of those Respondents filing Motions for Summary Judgment. (CR2:517).

Petitioner, Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased now brings this appeal from the summary judgments rendered in favor of Dr. Taylor, MMG and Methodist.

SUMMARY OF THE ARGUMENT

The informed consent provisions of the Texas Medical Liability and Insurance Improvement Act ("the Act"), Tex. Rev. Civ. Stat. Ann. Article 4590i, § 12.01 and § 6.02 (Vernon 2001), bar the health care liability claims asserted in this case which Petitioner has attempted to disguise as

fraud and deceptive trade practices causes of action. Furthermore, Petitioner has failed to demonstrate any reasons why this Court should exercise jurisdiction to hear this case pursuant to Supreme Court Rule 10(c).

ARGUMENT

A. Petitioner untimely and improperly raised the federal questions asserted in her Petition for Certiorari. Therefore, such arguments are waived.

A federal question must be raised in a proper and timely manner in the state courts in order to preserve the ability to raise them before this Court. The timeliness with which the federal question is raised in the state court is largely a matter for the state to regulate by its own procedural rules. Failure to raise the federal question at the stage of the proceedings required by state law will preclude review. *Edelman v. California*, 344 U.S. 357, 358-59 (1953).

Under Texas law, Petitioner's federal questions must have been asserted in the trial court in order to be raised on appeal. *Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959). In the instant case, the Petitioner failed to raise her federal questions until she filed her motion for rehearing to the Supreme Court of Texas. This Court has clearly ruled that it is too late to raise a federal question through a petition for rehearing to a state appellate court, *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935), except when the decision of that court unexpectedly gives rise to a federal question which the party seeking review had no previous

opportunity to assert, and could not fairly have anticipated. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

As set forth in the Statement of the Case, *supra*, Petitioner did not face an unexpected decision of the Supreme Court of Texas which gave rise to a federal question which she had no previous opportunity to assert, nor could she have fairly anticipated. *Id.* Therefore, Petitioner's presentation of her federal question to this Court is waived as untimely pled. Petitioner's reliance upon this Court's opinion in *Erie R.R. v. Purdy*, 185 U.S. 148, 153 (1902), is misplaced, because the Court ultimately held that

> [n]ow, where a party drawing in question in this court a state enactment as invalid under the Constitution of the United States, . . . did not raise such action . . . in the trial court, this court cannot review such final judgment, . . . if that court did nothing more than decline to pass upon the federal question because not raised in the trial court as required by the state practice.

Id. at 154 (citations omitted). Therefore, Petitioner waived her federal claims for failure to timely assert them in the state courts below.

B. Petitioner's claims are barred because the state-court decision below rested upon adequate and independent state grounds.

Even if Petitioner's federal question was timely raised in the state courts below, this Court should deny review because the complained-of state court judgment

was based on adequate and independent state grounds. As Justice Jackson stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.*** The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (citations omitted).

A bedrock principle of federalism is that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). As the Court can see from the intermediate state court of appeals decision found in Appendix A of the Petition for Writ of Certiorari, the court of appeals below decided this case exclusively on state law grounds, and never reached a federal question. Thus, the state court of appeals judgment rests on independent and adequate state grounds which this Court cannot review. *Johnson v. New Jersey*, 384 U.S. 719, 735-36 (1966).

C. Petitioner's arguments fail on the merits.

Even if the Court finds that Petitioner's federal questions were timely raised, and that the decision of the court below did not rely on independent and adequate state grounds, Petitioner's claims that the Texas informed-consent statute violates her Fourteenth Amendment privacy rights and access to courts rights under the Texas Constitution fail on the merits.

Recovery for a claim that a doctor failed to fully inform a patient of the risks of a course of treatment is governed by the Medical Liability and Insurance Improvement Act ("the Act"). Tex. Rev. Civ. Stat. Ann. & art. 4590i, § 6.02 (Vernon 2001). Petitioner's first reason in support of her petition states that the Act allegedly violates an individual's constitutionally protected right to refuse medical care under the Fourteenth Amendment. While it is true that the right to refuse treatment is a corollary of the doctrine of informed consent, and that competent individuals have a right to refuse medical treatment, *Cruzan v. Director, Mo. Dept. Health*, 497 U.S. 261, 270 (1990), the Act does not infringe upon Petitioner's right to refuse treatment.

Although a person's right to informed consent implicates a fundamental privacy right, the procedures in the Act do not denigrate either the ability to give knowledgeable consent to medical procedures, or the remedies available when correct risk disclosure is not made. All the Act does is prescribe the type of legal remedy available to an aggrieved party – a cause of action arising under negligence, rather than a claim for fraud or violation of the DTPA. Thus, the Act's informed-consent procedure does not violate an individual's privacy rights under the

Fourteenth Amendment. U.S. Const. amend. XIV; *Penick v. Christensen*, 912 S.W.2d 276, 286 (Tex. App. – Houston [14th Dist.] 1996, writ denied).

Petitioner's last argument in support of review alleges that the Act violates the open courts provision of the Texas Constitution. Tex. Const. art. I, § 13. That constitutional provision states: "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* Medical malpractice victims have a well-defined common law cause of action to sue for damages. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988). However, "no one has a vested right in the continuance of present laws in relation to a particular subject. . . . " *Middleton v. Texas Power & Light Company*, 185 S.W. 556, 560 (1916). The Texas legislature has the power to change and even repeal common law causes of action. *Id.* As long as this action is not exercised arbitrarily or unreasonably, and the legislature enacts reasonable substitutes for remedies it has withdrawn, legislative preemption of causes of action such as fraud and DTPA claims under the Act pass muster under the Texas Constitution's open courts provision. *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (1955).

The legislature did not abrogate Petitioner's ability to obtain a legal remedy for a violation of his right to informed consent. The Texas legislature enacted a reasonable substitute for common law informed consent actions such as claims under fraud and the DTPA, when it commanded that such claims can only be asserted as negligence claims under the Act. Thus, because the substance of the right to a jury trial is maintained under the Act, the

procedures used are within the discretion of the legislature, the informed-consent provision of the Act does not violate the open courts provision of the Texas Constitution. *Texas Workers Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 529 (Tex. 1995).

CONCLUSION

Petitioner's federal question was untimely asserted and therefore waived in the proceedings below. Furthermore, the state-court judgment rested upon an independent and adequate state ground, thereby denying this Court's ability to review that judgment. And finally, the informed-consent provision of the Act does not violate Petitioner's rights under the Fourteenth Amendment to the United States Constitution, or the open courts provision of the Texas Constitution. Thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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